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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

**MARLON MONTOYA,
INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS
SIMILARLY SITUATED,**

Plaintiff,

v.

FMS INVESTMENT CORP.,

Defendant.

Case No.:

CLASS ACTION

**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF PURSUANT
TO THE TELEPHONE CONSUMER
PROTECTION ACT, 47 U.S.C. § 227,
ET SEQ.**

JURY TRIAL DEMANDED

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INTRODUCTION

1. MARLON MONTTOYA (“Plaintiff”) brings this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of FMS INVESTMENT CORP. (hereinafter “Defendant”) in negligently contacting Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., (“TCPA”), thereby invading Plaintiff’s privacy. Plaintiff alleges as follows upon personal knowledge as to himself and his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by their attorneys.
2. The TCPA was designed to prevent calls like the ones described within this complaint, and to protect the privacy of citizens like Plaintiff. “Voluminous consumer complaints about abuses of telephone technology – for example, computerized calls dispatched to private homes – prompted Congress to pass the TCPA.”
3. In enacting the TCPA, Congress intended to give consumers a choice as to how creditors and telemarketers may call them, and made specific findings that “[t]echnologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer. TCPA, Pub.L. No. 102–243, § 11. Toward this end, Congress found that:

[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

Id. at § 12;

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- 1 4. Congress also specifically found that “the evidence presented to the
2 Congress indicates that automated or prerecorded calls are a nuisance and an
3 invasion of privacy, regardless of the type of call....” *Id.* at §§ 12-13.

4 JURISDICTION AND VENUE

- 5 5. This Court has federal question jurisdiction because this case arises out of
6 violation of federal law. 47 U.S.C. §227(b).
7 6. Venue is proper in the United States District Court for the Northern District
8 of California pursuant to 28 U.S.C. § 1391 for the following reasons: (i)
9 Plaintiff resides in the City of Pittsburg, County of Contra Costa, State of
10 California which is within this judicial district; (ii) the conduct complained
11 of herein occurred within this judicial district; and, (iii) many of the acts and
12 transactions giving rise to this action occurred in this district because
13 Defendant:

- 14 (a) is authorized to conduct business in this district and has
15 intentionally availed itself of the laws and markets within this
16 district;
17 (b) does substantial business within this district;
18 (c) is subject to personal jurisdiction in this district because it has
19 availed itself of the laws and markets within this district; and,
20 (d) the harm to Plaintiff occurred within this district.

21 PARTIES

- 22 7. Plaintiff is, and at all times mentioned herein was, a citizen and resident of
23 the City of Pittsburg, County of Contra Costa, State of California. Plaintiff
24 is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C.
25 § 153 (3).
26 8. Plaintiff is informed and believes, and thereon alleges, that Defendant is, and
27 at all times mentioned herein was, a corporation incorporated under the laws
28 of the State of Maryland with a headquarters at 351 West Camden Street,

1 Baltimore, MD, 21201, and is a “person,” as defined by 47 U.S.C. § 153
2 (39). Plaintiff alleges that at all times relevant herein Defendant conducted
3 business in the State of California and in the County of Contra Costa, and
4 within this judicial district.

5 **FACTUAL ALLEGATIONS**

6 9. Plaintiff alleges that at all times relevant herein Defendant conducted
7 business in the State of California, County of Contra Costa, and within this
8 judicial district.

9 10. At no time did Plaintiff ever enter into a business relationship with
10 Defendant.

11 11. Beginning sometime on or about May 2014, Defendant initiated numerous
12 telephone calls to Plaintiff’s telephone number ending in “9757.”

13 12. Each of these telephone communications constituted telephone solicitations,
14 as defined by 47 U.S.C. § 227(a)(4).

15 13. Each of Defendant’s calls constituted a call that was not for emergency
16 purposes, as defined by 47 U.S.C. § 227(b)(1)(A)(i).

17 14. Defendant’s calls were placed to telephone number assigned to a cellular
18 telephone service for which Plaintiff incurs a charge for incoming calls
19 pursuant to 47 U.S.C. § 227(b)(1).

20 15. Defendant did not have prior written express consent to call Plaintiff and
21 make these telephone solicitations, as defined by 47 U.S.C. § 227(a)(4).

22 16. On information and belief, Plaintiff believes that Defendant used an
23 “automatic telephone dialing system” (or “ATDS”), as defined by 47 U.S.C.
24 § 227(a)(1) to repeatedly call Plaintiff because Plaintiff was greeted by
25 “dead air” prior to speaking with Defendant.

26 17. This ATDS has the capacity to store or produce telephone numbers to be
27 called, using a random or sequential number generator.
28

1 18. These telephone communications by Defendant, or its agent, violated 47
2 U.S.C. § 227(b)(1).

3 19. Through the aforementioned conduct, Defendant has violated 47 U.S.C.
4 § 227 et seq.

5 **CLASS ACTION ALLEGATIONS**

6 20. Plaintiff brings this action on behalf of himself and on behalf of all others
7 similarly situated (“the Class”).

8 21. Plaintiff represents, and is a member of the Class, consisting of:

9 All persons within the United States who received any
10 telephone call/s from Defendant or their agent/s and/or
11 employee/s, not sent for emergency purposes, to said
12 person’s cellular telephone made through the use of any
13 automatic telephone dialing system and/or with an
14 artificial or prerecorded message within the four years
15 prior to the filing of this Complaint.

16 22. Defendant and its employees or agents are excluded from the Class.
17 Plaintiff does not know the number of members in the Class, but believes the
18 Class members number in the tens of thousands, if not more. Thus, this
19 matter should be certified as a Class action to assist in the expeditious
20 litigation of this matter.

21 23. Plaintiff and members of the Class were harmed by the acts of Defendant in
22 at least the following ways: Defendants, either directly or through its agents,
23 illegally contacted Plaintiff and the Class members via their cellular
24 telephones by using an ATDS, thereby causing Plaintiff and the Class
25 members to incur certain cellular telephone charges or reduce cellular
26 telephone time for which Plaintiff and the Class members previously paid,
27 and invading the privacy of said Plaintiff and the Class members. Plaintiff
28 and the Class members were damaged thereby.

29 24. This suit seeks only damages and injunctive relief for recovery of economic
30 injury on behalf of the Class, and it expressly is not intended to request any

1 recovery for personal injury and claims related thereto. Plaintiff reserves the
2 right to expand the Class definition to seek recovery on behalf of additional
3 persons as warranted as facts are learned in further investigation and
4 discovery.

5 25. The joinder of the Class members is impractical and the disposition of their
6 claims in the Class action will provide substantial benefits both to the parties
7 and to the court. The Class can be identified through Defendants' records or
8 Defendants' agents' records.

9 26. There is a well-defined community of interest in the questions of law and
10 fact involved affecting the parties to be represented. The questions of law
11 and fact to the Class predominate over questions which may affect
12 individual Class members, including the following:

- 13 a) Whether, within the four years prior to the filing of this Complaint,
14 Defendant or its agents initiated any telephonic communications to the
15 Class (other than a message made for emergency purposes or made
16 with the prior express consent of the called party) to a Class member
17 using any automatic dialing to any telephone number assigned to a
18 cellular phone service;
- 19 b) Whether Defendant can meet its burden of showing it obtained prior
20 express consent (i.e., consent that is clearly and unmistakably stated);
- 21 c) Whether Defendant's conduct was knowing and/or willful;
- 22 d) Whether Plaintiff and the Class members were damaged thereby, and
23 the extent of damages for such violation; and
- 24 e) Whether Defendants and its agents should be enjoined from engaging
25 in such conduct in the future.

26 27. As a person that received at least one telephonic communication from
27 Defendant's ATDS without Plaintiff's prior written express consent,
28 Plaintiff is asserting claims that are typical of the Class. Plaintiff will fairly

1 and adequately represent and protect the interests of the Class in that
2 Plaintiff has no interests antagonistic to any member of the Class.

3 28. Plaintiff and the members of the Class have all suffered irreparable harm as
4 a result of the Defendants' unlawful and wrongful conduct. Absent a class
5 action, the Class will continue to face the potential for irreparable harm. In
6 addition, these violations of law will be allowed to proceed without remedy
7 and Defendants will likely continue such illegal conduct. Because of the
8 size of the individual Class member's claims, few, if any, Class members
9 could afford to seek legal redress for the wrongs complained of herein.

10 29. Plaintiff has retained counsel experienced in handling class action claims
11 and claims involving violations of the Telephone Consumer Protection Act.

12 30. A class action is a superior method for the fair and efficient adjudication of
13 this controversy. Class-wide damages are essential to induce Defendants to
14 comply with federal and California law. The interest of Class members in
15 individually controlling the prosecution of separate claims against
16 Defendants is small because the maximum statutory damages in an
17 individual action for violation of privacy are minimal. Management of these
18 claims is likely to present significantly fewer difficulties than those
19 presented in many class claims.

20 31. Defendant has acted on grounds generally applicable to the Class, thereby
21 making appropriate final injunctive relief and corresponding declaratory
22 relief with respect to the Class as a whole.

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FIRST CAUSE OF ACTION
NEGLIGENT VIOLATIONS OF THE
TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227 ET SEQ.

32.Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

33.The foregoing acts and omissions of Defendant constitutes numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

34.As a result of Defendant's negligent violations of 47 U.S.C. § 227 et seq, Plaintiff and the Class are entitled to an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

35.Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

SECOND CAUSE OF ACTION
KNOWING AND/OR WILLFUL VIOLATIONS OF THE
TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227 ET SEQ.

36.Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

37.The foregoing acts and omissions of Defendant constitutes numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et seq.

38.As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227 et seq, Plaintiff and the Class are entitled to an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

39. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and the Class Members pray for judgment as follows:

- Certifying The Class as requested herein;
- Providing such further relief as may be just and proper.

In addition, Plaintiff and The Class Members pray for further judgment as follows:

**FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF
THE TCPA, 47 U.S.C. § 227 ET SEQ.**

- As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

**SECOND CAUSE OF ACTION FOR KNOWING/WILLFUL VIOLATION OF
THE TCPA, 47 U.S.C. § 227 ET SEQ.**

- As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

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TRIAL BY JURY

40. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Dated: April 16, 2015

Respectfully submitted,

KAZEROUNI LAW GROUP, APC

By: s/ ABBAS KAZEROUNIAN
ABBAS KAZEROUNIAN, ESQ.
ATTORNEYS FOR PLAINTIFF

[ADDITIONAL PLAINTIFF'S COUNSEL]

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